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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA

8 MITCHELL ENGINEERING,

No. C 08-04022 SI

9 Plaintiff,

10 NOTICE TO COUNSEL RE  
11 INSTRUCTIONS

12 v.

13 CITY AND COUNTY OF SAN FRANCISCO,  
14 et al.,

15 Defendant.  
16 \_\_\_\_\_/

17 Having reviewed the evidence presented at trial and the instructions presented by the parties, the  
18 Court has concluded that it should not instruct separately on the question of procedural due process.  
19 Plaintiff's claim is that defendants' termination of plaintiff's Central Pump contract was done in  
20 deliberate retaliation for plaintiff's First Amendment activities. Plaintiff contends that the termination  
21 had the consequence both of ending the contract and of effectively debarring him from public  
22 contracting in San Francisco, by operation of the newly-enacted prequalification ordinances.

23 It has neither been asserted nor proved that the prequalification ordinance was improperly  
24 enacted, or that such ordinances, in the abstract, violate any procedural due process requirements.  
25 Rather, plaintiff's theory has been that the existence of the ordinance exacerbated the consequences of  
26 the allegedly retaliatory contract termination.

27 Neither plaintiff nor defendant has provided the Court with any coherent instruction governing  
28 the procedural due process claims, and this appears to be because the claim is better subsumed under  
the general retaliation rubric. If defendants were not acting in retaliation, as plaintiff contends, then any  
collateral due process claim would fail; conversely, if defendants did act in retaliation, plaintiff would

1 be free to claim damages related to the constructive debarment theory.

2 The Court will discuss this matter with counsel at the instruction conference tomorrow.

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4 Dated: September 27, 2010



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6 SUSAN ILLSTON  
United States District Judge